and in recognition of, the rights of the other party.[9] Nor does it seem that the length of the term or the small value of the reversion should make any difference as to the relation of the parties or as to their rights and liabilities in respect to each other.

To follow the holding of the lower court would simply be to disregard the established law as to what constitutes the relation of landlord and tenant and allow those who merely hold possession under a leasehold interest to defeat the titles of the owners of the reversion of a large part of the land in the business district of San Francisco.

L. J. M.

PLEADING: SUFFICIENCY OF THE COMMON COUNTS.—In view of the numerous decisions of the courts of this state, the last of which is *Pike v. Zadig,*[1] there should be no further doubt as to the sufficiency of the common counts under our system of pleading. Complaints so framed have been attacked by every available method known to the law; uncompromising criticism has been heaped upon them by distinguished writers;[2] the courts have expressed their inability to reconcile them with the code system of pleading;[3] and yet they have been held good as against the defendant's answer,[4] his general demurrer,[5] and his special demurrer.[6]

It is interesting to note that framers of the codes had in mind the use of the common counts as one of the serious defects of the old system of pleading. David Dudley Field, in an Essay published in 1847,[7] says in this regard:

"Besides the general pleas, which we call general issues, we have general declarations, or common counts, as they are called. These have been so contrived as to give no information of the particular demand. This form has been encouraged by the courts,

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[9] Tiffany, Landlord and Tenant, vol. I, § 4.

[1] (Oct. 30, 1915), 50 Cal. Dec. 453, 152 Pac. 923.

[2] Pomeroy's Code Remedies, § 540.

[3] Abadie v. Carrillo (1867), 32 Cal. 172; Leeke v. Hancock (1888), 76 Cal. 127, 17 Pac. 937; Minor v. Baldridge (1898), 123 Cal. 187, 55 Pac. 783; Pike v. Zadig, supra, n. 1.

[4] Minor v. Baldridge, supra, n. 3.

[5] Abadie v. Carillo, supra, n. 3; Friermuth v. Friermuth (1873), 46 Cal. 42; Clay v. Carroll (1885), 67 Cal. 19, 6 Pac. 874; Dashaway Ass'n. v. Rogers (1889), 79 Cal. 211, 21 Pac. 742; Kraner v. Halsey (1889), 82 Cal. 209, 22 Pac. 1137; Curtiss v. Aetna Life Ins. Co. (1891), 90 Cal. 245, 27 Pac. 211; Whitton v. Sullivan (1892), 96 Cal. 480, 31 Pac. 1115; Burns v. Cushing (1892), 96 Cal. 669, 31 Pac. 1124; Farwell v. Murray (1894), 104 Cal. 464, 38 Pac. 199.

[6] Rogers v. Duff (1892), 97 Cal. 66, 31 Pac. 836; Pleasant v. Samuels (1896), 114 Cal. 34, 45 Pac. 998; Preston v. Central Cal. etc. Co. (1909), 11 Cal. App. 190, 104 Pac. 462; Pike v. Zadig, supra, n. 1. Dicta to the contrary appear in Shade v. Sisson M. & L. Co. (1896), 115 Cal. 357, 47 Pac. 135; Minor v. Baldridge, supra, n. 3.

[7] Published also in his Speeches, Arguments, etc., 1884, vol. 1, page 226, 236.

so as to allow a vast number of demands to be proven in evidence under it. It has consequently become a common form of declaration; and even where special counts are used, the common counts are generally added. It appears, therefore, that there has been a constant struggle of the lawyers and the courts to evade the rules which they themselves have framed. They make the rules and they defend them, as a means of eliciting the precise point in dispute between the parties; and they contrive every means in their power to conceal it, under forms the most general and unmeaning that can be imagined."

Section 426 of the Code of Civil Procedure specifically requires that a complaint contain a statement of the facts constituting the cause of action in ordinary and concise language; yet the only effect of this provision on the use of the common counts has been to permit the omission of certain fictions and presumptions of the law that were required by the common law. It has been held that the count need not contain a promise to pay, nor need it contain an allegation of indebtedness, nor of the fact that the services were rendered at the defendant's request, when such allegations can be implied from the rest of the complaint.[8] It has further been held that the plaintiff need not allege that money was had and received "to the use of the plaintiff" when a direct promise to pay is expressly alleged,[9] nor need he specially state when the defendant became indebted to him.[10] The courts have gone thus far on the ground that mere conclusions of law amount to surplusage, and are not essential to a statement constituting the cause of action.

Instead of stating the actual facts of the case, a common count contains only conclusions of law, or, at best, the legal effect of the actual facts which the plaintiff expects to prove. The circumstances under which one person may be liable for money had and received, for instance, are very numerous, embracing contracts express or implied, and even torts and frauds. The mere averment that the defendant is indebted for money had and received admits any of these circumstances in its support, but it does not disclose nor even suggest the real nature of the liability, the actual cause of action upon which the plaintiff relies.[11]

Where an express contract has been fully performed by him, and nothing remains but the payment of money by the defendant,

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[8] Wilkins v. Stidger (1863), 22 Cal. 231; De La Guerra v. Newhall (1880), 55 Cal. 21; Donegan v. Houston (1907), 5 Cal. App. 626, 90 Pac. 1073; Aydelotte v. Billing (1908), 8 Cal. App. 673, 97 Pac. 698.

[9] Rand v. Columbian Realty Co. (1910), 13 Cal. App. 444, 110 Pac. 322.

[10] Pleasant v. Samuels, supra, n. 6; Pike v. Zadig, supra, n. 1.

[11] Pomeroy's Code Remedies, § 544; 8 Cyc. 341.

In the following cases fraud was proved: Fratt v. Clark (1859), 12 Cal. 89; Roberts v. Evans (1872), 43 Cal. 380; Minor v. Baldridge, supra, n. 3; Winkler v. Jerrue (1912), 20 Cal. App. 555, 129 Pac. 804.

the plaintiff may elect whether he will plead specially on the contract, or generally, using the common counts.[12] But so long as the contract remains executory, or a condition precedent remains unperformed, the plaintiff must declare specially.[13] If the mode of payment is other than in money, the count must be on the original contract.[14] And if a term of credit be given, the action may not be brought on the common count until such term has expired.[15] The common count may also be used where the contract, though partly performed, has been rescinded, or the complete execution thereof was prevented by the defendant,[16] or where it appears that what was done by the plaintiff was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by him.[17]

H. L. K.

TRUSTS: POWER TO REVOKE IN ABSENCE OF AN EXPRESS POWER OF REVOCATION.—*Gray v. Union Trust Company of San Francisco*[1] presents a situation novel in California. Miss Gray conveyed certain real and personal property to the defendant upon the following trusts: first, the net income of the property, less the cost of administration, was to be paid to the settlor during her life; second, upon her death, the entire property was to be divided among her heirs according to the laws of succession of the state of California as they existed at the time of the conveyance, with a power reserved to the settlor to make different provision as to the ultimate disposition of the property by her last will. Later Miss Gray repented having created the trust and wished to revoke it. The question to be decided was whether she might do this in the absence of a reservation of a power of revocation.

Courts of equity have a discretionary power to terminate a trust, but this power is never to be exercised unless every beneficiary under the trust is before the court and consents to the decree.[2] The inquiry in this case reduces itself to a determination of the question, who were the beneficiaries under the trust.

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[12] Leeke v. Hancock, supra, n. 3; Donegan v. Houston, supra, n. 7.

[13] O'Connor v. Dingley (1864), 26 Cal. 11; Barrere v. Somps (1896), 113 Cal. 97, 45 Pac. 177; Roche v. Baldwin (1902), 135 Cal. 522, 67 Pac. 903; Davisson v. East Whittier Land Co. (1908), 153 Cal. 81, 96 Pac. 88.

[14] O'Connor v. Dingley, supra, n. 12.

[15] By way of dictum in Castagnino v. Balletta (1889), 82 Cal. 250, 23 Pac. 127.

[16] Brown v. Crown Gold Mining Co. (1907), 150 Cal. 376, 89 Pac. 86; Breen v. Roy (1908), 8 Cal. App. 475, 97 Pac. 170.

[17] Castagnino v. Balletta, supra, n. 14; Donegan v. Houston, supra, n. 7; Naylor v. Adams (1911), 15 Cal. App. 548, 115 Pac. 335.

[1] (Dec. 31, 1915), 51 Cal. Dec. 16, 154 Pac. 306.

[2] Eakle v. Ingram (1904), 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99; Godfrey v. Roberts (1903), 65 N. J. Eq. 323, 55 Atl. 353; In re Harrar's Estate (1914), 244 Pa. 542, 91 Atl. 503.